HENRY [illegible],
Plaintiff in Error,

vs.

THE STATE OF NEBRASKA,
Defendant in Error.

ERROR TO THE SUPREME COURT OF NEBRASKA.

[illegible] W. Wray,
for Plaintiff in Error.

ATTORNEY GENERAL OF THE STATE OF NEBRASKA,
for Defendant in Error.

IN THE SUPREME COURT

...OF THE...

UNITED STATES.

HENRY BOLLN,
Plaintiff in Error,

vs.

THE STATE OF NEBRASKA,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

ERROR TO THE SUPREME COURT OF NEBRASKA.

JOEL W. WEST,
for Plaintiff in Error.

ATTORNEY GENERAL OF THE STATE OF NEBRASKA,
for Defendant in Error.

The Act of Congress of April 19th, 1864, [Thirteenth United States Statutes at Large, page 47,] was passed for the purpose of enabling the people of Nebraska to form a constitution and state government, and for the admission of such state into the Union.

After making provisions for the boundaries of the proposed state, and for a constitutional convention, the Act, by Section 4 thereof, provided:

"That members of the convention thus elected shall meet at the capital of said territory on the first Monday in July, next, and after organization, *shall declare on behalf of the people of said territory that they adopt the Constitution of the United States*, whereupon the said convention shall be, and it is hereby authorized to form a constitution and state government; provided, that the constitution, when formed, shall be republican and not repugnant to the Constitution of the United States and the principles of the Declaration of Independence; * * *."

Pursuant to that Act, the convention adopted a state constitution, of which Section 6, of Article XI, provides:

"This constitution is formed, and the State of Nebraska asks to be admitted into the Union on an equal footing with the original states on the condition and faith of the terms of the proposition stated and specified in an Act of Congress, approved April nineteenth, 1864, authorizing the people of the territory to form a constitution and state government; the people of the State of Nebraska hereby accepting the conditions in said Act specified."

Section 8, Article I, of said State Constitution, (being the declaration of rights) provided that,

"No person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or in the navy, or the militia when in actual service in time of war or public danger; and no person for the same offense shall be put twice in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require."

Upon the adoption of said constitution by the vote of the people, the fact of its adoption, with a copy of the said constitution, was duly certified to the president under the provisions of the Act, and thereupon, by a proclamation of the president, Andrew Johnson, of date March 1st, 1867, it was formally

proclaimed and declared that the fundamental conditions imposed by Congress on the State of Nebraska, to entitle that state to admission to the Union, had been ratified and accepted and fully complied with, and that the admission of said state into the Union was on that date complete.

Afterwards, in 1875, the people of the State of Nebraska adopted for themselves a new constitution, of which Section 10, of Article I, (being of the bill of rights) provided that:

"No person shall be held to answer for a criminal offense, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in case of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, unless on a presentment or indictment of a grand jury; provided, *that the legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law abolish, limit, change, amend, or otherwise regulate the grand jury system.*"

Afterwards, in 1885, the legislature passed Chapter LIV of the Criminal Procedure, for the purpose, as it is contended by the state, to enable prosecutions of criminal offenses of the grade of felonies on information of a public prosecutor, under the permission granted by the proviso in Section 10 above quoted. The chapter is as follows:

"Chapter LIV.—Prosecution of offenses by information. An Act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges.

Be it enacted by the Legislature of the State of Nebraska:

"Section I. (JURISDICTION.)—That the several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon information, for crimes, misdemeanors, and offenses, to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of the like prosecutions upon indictments.

"Section II. (INFORMATION.)—All informations shall be filed during term in the court having jurisdiction of the offense specified

therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may, by rule or otherwise, prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him.

"Section III. (SAME—VERIFICATION—STATEMENT OF OFFENSE.)—All information shall be verified by the oath of the prosecuting attorney, complainant, or some other person, and the offense charged therein shall be stated with the same fullness and precision in matters of substance as is required in indictments in like cases. Different offenses and different degrees of the same offense may be joined in one information, in all cases where the same might, by different counts in one indictment; and in all cases a defendant or defendants shall have the same right, as to proceedings therein, as he or they would have if prosecuted for the same offense upon indictment.

"Section IV. (ACTS APPLICABLE.)—That the provisions of Chapters XL, XLI, XLII, XLIII, XLIV, XLV, of the Criminal Code in relation to indictments, and all other provisions of law applying to prosecutions upon indictments to writs, and process therein, and the issuing and service thereof, to motions, pleadings, trials, and punishments, or the execution of any sentence and to all other proceedings in cases of indictment, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as near as may be, apply to informations, and all prosecutions and proceedings therein.

"Section V. (IMPRISONMENT—RECOGNIZANCE.)—Any person who may, according to law, be committed to jail, or become recognized or held to bail with sureties for his appearance in court to answer to any indictment, may in like manner so be committed to jail or become recognized and held to bail for his appearance, to answer to any information or indictment, as the case may be.

"Section VI. (DUTY OF PROSECUTOR.)—It shall be the duty of the prosecuting attorney of the proper county to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination, as provided by law, touching the commission of any offense wherein the offender shall be committed to jail, or become recognized or held to bail, and if the prosecuting attorney shall determine in any such case that an information ought not to be filed, he shall make, subscribe, and file with the clerk of the court, a statement in writing containing his reasons, in fact and in law, for not filing an information in such case, and that such statement shall be filed at

and during the term of court at which the offender shall be held for his appearance; provided, that in such case such court may examine said statement, together with the evidence filed in the case, and if, upon such examination, the court shall not be satisfied with said statement, the prosecuting attorney shall be directed by the court to file the proper information, and bring the case to trial.

"Section VII. (GRAND JURIES.)—Grand juries shall not hereafter be drawn, summoned, or required to attend at the sittings of any court within this state, as provided by law, unless the judge thereof shall so direct by writing, under his hand, and filed with the clerk of said court.

"Section VIII. (PRELIMINARY EXAMINATION.)—No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination; provided, however, that information may be filed without such examination against fugitives from justice, and any fugitive from justice against whom an information shall be filed may be demanded by the governor of said state of the executive authority of any other state or territory, or of any foreign government, in the same manner, and the same proceedings may be had thereon as provided by law in like cases of demand upon indictment filed.

"Approved March 9th, A. D. 1885."

No other authority of any kind has ever been given by the legislature for prosecuting offenses upon the information of a public prosecutor.

Section XI, Article I, of the Constitution of Nebraska, provides:

"In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, *and a speedy public trial by an impartial jury* of the county or district in which the offense is alleged to have been committed."

By legislative enactment, Section 270 of the Code, a trial

is defined thus:

"A trial is the judicial examination of the issues, whether of law or of fact, in an action."

Section 124, of the Criminal Code, defines the crime of embezzlement of public money by an officer or other person charged with the collection, receipt, safe keeping, transfer or disbursement of the public money or any part thereof. And, among other things, provides that such a crime

"* * * * * * is hereby declared to be a *high crime* and such officer or person shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled * * * * * * * *."

By Section 247, of the Criminal Code, "*felony*" is defined thus:

"The term "felony" signifies such an offense as may be punished with death or imprisonment in the penitentiary." * * *

By Section 2, Article 7, of the Constitution of the State of Nebraska, persons convicted of felony are disfranchised, which provision is in the following terms:

"No person shall be qualified to vote who is *non compos mentis* or who has been convicted of treason or felony under the law of the state or of the United States. * * * *."

The constitutional and statutory provisions above quoted are all that are necessary for a discussion of the Federal questions, which, it is claimed by plaintiff in error, are presented by the record.

Under the provisions of the Criminal Code above quoted, and upon no other authority whatsoever, the County Attorney of Douglas County, Nebraska, on the 2nd day of April, 1896,

made and filed an information against the plaintiff in error, which, by numerous counts, charged the plaintiff in error with the embezzlement of public moneys, as city treasurer of the City of Omaha and *ex-officio* treasurer of the school district of Omaha.

To this information the plaintiff in error, on the 4th day of April, 1896, filed a plea in the nature of a plea in abatement, which prayed judgment that said information might be quashed for many reasons; the ninth ground being:

"Because the defendant has had no preliminary examination touching the crime charged in this information, nor did he waive the same."

Upon this allegation the State made an issue by filing on the 6th day of April, 1896, an answer as follows:

"Plaintiff admits that defendant has had no preliminary examination for said crime, referred to in said ninth paragraph, but alleges that said defendant did waive said preliminary examination and his right thereto."

On the 8th day of April, 1896, the cause came on for trial on the issue so made, whereupon the plaintiff in error demanded a trial of said issue by a jury, which demand was refused by the court and over the objection of the plaintiff in error, a trial was thereupon had to the court *without a jury*, resulting in a finding and judgment against said plaintiff in error upon said plea.

Prior to this trial, and on the 4th day of April, the sufficiency of the information and the right to file the same was challenged by the plaintiff in error in a motion to quash, by a demurrer, and as well by the plea in abatement, in the following language, identical in each case: Because,

"1. That there is no authority in law under and by which the County Attorney is authorized to file an information charging this defendant with a felony.

"2. Because the defendant, under Section 10, of Article I, of the Constitution of the State of Nebraska, has been granted immunity from answering to a criminal charge, except on presentment or indictment of a grand jury, and which immunity has not been by the legislature abrogated.

"3. Because this prosecution is in contravention of Section 3, Article I, of the Constitution of the State of Nebraska, which guarantees that no person shall be deprived of life or liberty without due process of law.

"4. Because this prosecution is in contravention of Section 1, of Article XIV, of the Constitution of the United States of America, by which the State of Nebraska has been forbidden to deprive this defendant of life or liberty without due process of law."

These grounds were held by the court to be insufficient, and the decision of said court was against the right, privilege and immunity so specially set up and claimed.

Afterward, on April 8th, 1896, the plaintiff in error was arraigned, whereupon, as a challenge to the jurisdiction of the court over his person, and not contumaciously, *he refused to plead, but stood mute.* The court then entered a plea of not guilty for and on behalf of the defendant.

A trial of the issues was thereupon had, and on the 9th day of May, 1896, the jury returned a verdict finding the plaintiff in error guilty upon three several counts as charged in the information.

On the 16th day of May, 1896, the District Court of Douglas County, in which the plaintiff had been tried, rendered its judgment upon said verdict, that the said Henry Bolln, plaintiff in error, be punished by imprisonment in the penitentiary for three several, cumulative terms, aggregating nineteen

years, and pay a fine of more than two hundred thousand dollars.

Proceedings in error were thereupon prosecuted in the Supreme Court of the State of Nebraska, being the court of last resort, for the purpose of reviewing and reversing said sentence and judgment.

In these proceedings, among the numerous assignments of error, it was alleged that the proceedings upon the trial were erroneous.

Because there was no authority of law under and by which the County Attorney was authorized to file an information charging the defendant with a felony.

Because the defendant, under Section 10, of Article I, of the Constitution of the State of Nebraska, has been granted immunity from answering to a criminal charge, except upon presentment or indictment of a grand jury, and which immunity had not been by the legislature abrogated.

Because the prosecution was in contravention of Section 3, Article I, of the Constitution of the State of Nebraska, which guarantees that no person shall be deprived of life or liberty without due process of law.

Because the prosecution was in contravention of Section 1, of Article XIV, of the Constitution of the United States of America, by which the State of Nebraska had been forbidden to deprive the defendant of life or liberty without due process of law.

The cause being submitted to the said Supreme Court upon the petition in error and the record, the decision again was against the right, privilege and immunity so specially set up and claimed, and the judgment and sentence of the trial court was affirmed.

Bolln vs. The State, 51 Neb., 581.

Pursuant to said judgment and sentence the plaintiff in error was thereupon incarcerated in the penitentiary of the state, where he ever since has been and now is.

The following assignment of errors are relied upon for a reversal of this cause:

1. The court erred in holding that "A denial of a jury trial upon an issue of fact tendered by a plea in abatement is not reversible error," for that Section 11, of Article I, of the Constitution of the State of Nebraska, guarantees that in all criminal prosecutions the accused shall have the right to a speedy public *trial by jury*, the adoption of which provision was but declaratory of the Common Law, and was intended to make definite and certain what in this state should be in that respect, "due process of law."

And with the same end in view, and to make yet more definite and certain the full scope and meaning of said provision, and what should constitute "due process of law," and that there might by an unequivocal enunciation of what is "the law of the land" in that behalf in this state, the legislature of the State of Nebraska enacted Section 279, of the Code of Civil Procedure, defining "A Trial" as "a judicial examination of the issues, whether of law or of fact, in an action," whereby plaintiff in error has been deprived of his liberty without due "process of law," contrary to Section 1, Article XIV, of the Amendments to the Constitution of the United States.

2. That the court erred in holding that "A denial of a

jury trial upon an issue of fact tendered by a plea in abatement is not reversible error," for the further reason that plaintiff in error asserted and claimed under the Constitution of the United States, to-wit, under Article VI of the amendments thereof, the right and privilege of a trial by jury, which said provision of the constitution was required to be adopted and was adopted by the people of the State of Nebraska, pursuant to Section 4 of the act of Congress passed April 19th, 1864, through, by and under which the State of Nebraska was enabled to adopt a constitution and become one of the states of the Union, by reason of which premises said provisions of the Constitution of the United States constitutes in the State of Nebraska that which is "due process of law," and "the law of the land," the decision of the said Supreme Court of Nebraska being against the right and privilege so asserted and claimed.

3. The court erred in holding that "A denial of a jury trial upon an issue of fact, tendered by a plea in abatement, is not reversible error," for that such decision and holding contravenes Section 1, Article XIV, of the amendment of the Constitution of the United States, for that thereby plaintiff in error was deprived of his liberty without "due process of law."

4. The court erred in holding "that Chapter 54, of the Criminal Code, authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county," for that such holding is contrary to Section 10, Article I, of the Constitution of the State of Nebraska, which secures to all persons accused of crime punishable by imprisonment in the penitentiary immunity from answering, except upon present-

ment or indictment of a grand jury, and which immunity has not been taken away, abrogated or in any manner abridged by the legislature of the State of Nebraska, and more particularly has it not been so taken away, abrogated or abridged by said Chapter 54, of the Criminal Code.

5. The court erred in holding "that Chapter 54, of the Criminal Code authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county," for that said Section 10, of Article I, of the Constitution of the State of Nebraska, was enacted for the purpose of fixing definitely and certainly in the fundamental law that which should constitute in this state "due process of law," and that which should be "the law of the land," and by such holding the plaintiff in error has been deprived of his liberty without "due process of law," contrary to Section 1, Article XIV, of the Amendments of the Constitution of the United States.

6. The court erred in holding "that Chapter 54, of the Criminal Code, authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county," for that such holding contravenes Article 5, of the amendments of the Constitution of the United States, which secures to all persons accused of infamous crimes immunity from answering unless on a presentment or indictment of a grand jury, and which said provision was required to be adopted, and was adopted, by the people comprised within the territory of the State of Nebraska, pursuant to Section 4, of the Act of Congress passed April 19th, 1864, through and by which the people comprised within said territory were enabled to adopt a

state constitution and become one of the States of the Union, by which premises the said Article V, of the Amendments of the Constitution of the United States, became, was and is, within the State of Nebraska, "due process of law" and "the law of the land," and by reason of which holding plaintiff in error has been deprived of liberty without "due process of law," contrary to Section 1, Article XIV, of the Amendments of the Constitution of the United States.

7. The court erred in affirming the decision of the District Court of Douglas County, wherein and whereby the plaintiff in error was convicted of an infamous crime and sentenced to the penitentiary of the State of Nebraska for three several terms, aggregating nineteen years. Whereby, plaintiff in error has been depriveed of his liberty without due process of law, contrary to Section 1, Article XIV, of the Amendments of the Constitution of the United States, for that said Supreme Court of the State of Nebraska is the highest court in said state in which said cause can be heard and determined.

ARGUMENT.

On behalf of the plaintiff in error it is claimed:

1. That due process of law as to *federal jurisdiction* comprehends immunity from being compelled to answer to a capital or otherwise infamous offense, except upon the presentment or indictment of a grand jury.

Hurtado vs. California, 110 U. S., 535.

In the District of Columbia, nor in any of the territories, nor in any Federal Court, could a prosecution of a felony made, specially infamous as a "*high crime*," be legally carried on in any other way.

2. It was the intent and purpose of Section 4, of the Act of Congress of April 19th, 1864, which authorized the people of Nebraska to form a constitution and state government to perpetuate within the geographical limits which was to comprise the State of Nebraska all of those broad and general maxims and safe-guards of liberty which were secured by our federal constitution in the Bill of Rights.

As no one could be prosecuted in a Federal Court or in any federal territory contrary to the provisions of the Fifth Amendment, so it was intended by the Act of Congress above referred to, that no one should ever, within the State of Nebraska, after its admission into the Union, be prosecuted in any State court, contrary to the provisions of the said amendment.

As compliance with all the provisions of the Federal Bill of Rights at the very least constituted due process of law in the

federal jurisdiction, so it was intended by the Act of Congress above referred to, that within the State of Nebraska, after its admission into the Union, nothing short of compliance with those provisions would or could constitute due process of law.

3. The people of the State of Nebraska have no power to adopt any constitutional provision that will in any manner take away or abridge any right, privilege or immunity that the people had secured to them by the Federal Constitution, while under the territorial government, and it is therefore claimed that that part of Section 10, of Article I, of the Constitution of the State of Nebraska of 1875, which undertook to give the legislature authority to provide by law for holding persons to answer for criminal offenses on information of a public prosecutor, is void and of no effect.

For the purpose of the discussion, we adopt, as a definition of "due process of law," as used in the Fourteenth Amendment, the enunciations by this court in numerous cases.

> "It (due process of law,) refers to *that law of the land in each state* which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure."
>
> *Hurtado vs. California*, supra (page 535).

"The law of the land necessarily means the law of the state where the offense is committed and where the trial takes place."

Hurtado vs. California, supra.

Garnett vs Jennings (Ky.), 44 S. W., 382.

"The XIV amendment was not designed to confine the states to particular modes or procedure in judicial proceedings. It does not mean, nor has it the effect, to limit the power of state governments in the prosecution of criminals to any particular mode of procedure in the selection of its jurors, or manner of conducting its trials, *but require that such trials shall be conducted in the due course of the administration of justice according to the prescribed forms and judicial procedure of the state for the protection of the individual rights and liberties of its citizens.*"

Hurtado vs. California, supra (p. 533).
Walker vs. Savinet, 92 U. S., 90.
Davidson vs. New Orleans, 96 U. S., 97.

"Due process of law is process due according to the law of the land. *This process in the states is regulated by the law of the state.*"

2 Hare Const. Law, pp. 751-752.

"Without attempting to define exactly in what due process of law consists, it is sufficient to say that if the Supreme Court of a state had acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process.

Missouri vs. Lewis, 101 U. S., 22.

These quotations furnish the text of the argument that follows.

It is claimed that Nebraska came into the Union under the Act of Congress referred to, with the right of her people

"to make their own laws and alter them at pleasure"

limited by all the provisions of the federal constitution, which, in their nature, were enunciations of those rights, privileges, immunities and safe-guards secured by Magna Charta and our Bill of Rights, as contained in the Federal Constitution.

In Cooley's Constitutional Limitations, 4th edition, page 38, it is said:

"In regard to the formation and amendment of state constitutions, the following appear to be settled principles of American Constitutional law:

"I. The people of the several territories may form for themselves state constitutions whenever enabling acts for that purpose are passed by Congress, *but only in the manner allowed by such enabling acts.* * * * * *

"II. * * * * *

"III. * * * * *

"IV. * * * * *

"V. The power of the people to amend or revise their constitution is limited by the Constitution of the United States in the following particulars:

"(1.) It must not abolish the republican form of government, since such Act would be revolutionary in its character, and would call for and demand direct intervention on the part of the government of the United States.

"(2.) It must not provide for titles of nobility, or assume to violate the obligation of any contract, or attaint any persons of crime, or provide *ex post facto* for the punishment of acts by the courts which were innocent when committed, or contain any other provision which would, in effect, amount to the exercise of any power expressly or impliedly prohibited to the states by the Constitution of the Union. For while such provisions would not call for the direct and forcible intervention of the government of the Union, it would be the duty of the courts, both state and national, to refuse to enforce them, and to declare them altogether void, as much when enacted by the people in their primary capacity as makers of the fundamental law, as when enacted in the form of statutes through the delegated power of their legislatures."

The court is bound to give to Section 4, of the Enabling

Act above quoted, such an interpretation as will give it some force and effect as distinguished from a mere meaningless provision.

It needed no specific act on the part of the people within the proposed State of Nebraska to make the Federal Constitution operative and effective to the same degree and extent that it was effective and operative in every other state. In that respect they could neither add to nor detract from its operative force by any act of their own. So that to give Section 4, of the Enabling Act above quoted, a legitimate meaning, it must be understood that by the words "shall declare on behalf of the people of said territory that they adopt the Constitution of the United States," it was the intention of Congress that the Constitution of the United States within the State of Nebraska should have a peculiar and local binding force and effect, not common to the other states.

The country had just emerged from a civil war, brought about in no small degree by the doctrine of State Rights, promulgated and adhered to by a large number of the states. In view of the history of the times it can hardly be doubted that Congress intended by the words used in the Enabling Act above quoted, that the same limitations upon federal power provided by the first ten amendments should also be limitations upon the state power within the State of Nebraska.

It may be put down as nothing short of an absolute certainty, that at that time Congress would not have tacitly or by implication assented to the doctrine that the Consitution of the

Unied States was not paramount and supreme in every foot of federal territory.

To suppose that the provision of the Enabling Act quoted was placed there for the purpose of making the Constitution of the United States binding and effective within the proposed State of Nebraska in the same sense that it was binding upon the other states, would have amounted to such an admission.

It cannot be supposed that that provision was put into the Enabling Act as a mere excess of prudence. The war had already been fought and won, and every question involved in the waging of it had been forever settled. These considerations support our contention by *a proof reductio ad absurdum.*

Prior to the admission of Nebraska into the Union no such requirement had ever been exacted from any other state seeking admission.

The people of the territory of Nebraska were not then, nor never had been, in a state of rebellion against the general government. The federal authority within that territory had always been loyally recognized. The United States courts sitting in and for that district were then, and always had been, exercising their jurisdiction freely and without question. The United States marshals were then, and always had been, executing the federal writs and processes without let or hindrance, so that we are led irresistibly to the conclusion that the people of the State of Nebraska were required to adopt the Constitution of the United States, to the end and purpose that all of its broad and fitting provisions should become a part of the organic law of the new state, more fundamental and immutable

than any constitution or law that the state itself might adopt, and not as an overt and conspicuous act of allegiance.

Carrying out the principles embodied in the quotation above made, from Cooley's Constitutional Limitations, and applying them to the power of the people of Nebraska, to amend or revise their constitution, in view of the construction which we place upon Section 4, of the Enabling Act, then to the powers which he enumerates as prohibited to the states by the Constitution of the Union, there would, with respect to Nebraska, be added other prohibitions; that is to say, the State of Nebraska can neither by constitutional nor statutory provision establish any religion nor prohibit the free exercise thereof; nor abridge the freedom of speech or of the press; nor the right of the people peaceably to assembly and petition the government for a redress of grievances. Nor can it infringe upon the right of the people to keep and bear arms. Nor can it, in time of peace, quarter any soldier in any house without the consent of the owner. Nor can it interfere with the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. *Nor can it provide for holding any person to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury*, except within the proviso of the Federal Constitution. Nor in *any* criminal prosecution can it deprive the accused of his right to a speedy public *trial by an impartial jury*.

To attempt to do any of these things, contrary to the provisions of the Federal Constitution within the State of Nebraska, is to proceed without due process of law.

To use the language of Judge Cooley, while the enactment of constitutional provisions which might attempt to do any of those things within the State of Nebraska, "*would not call for the direct and forcible intervention of the government of the Union, it would be the duty of the courts, both state and national, to refuse to enforce them, and to declare them altogether void, as much when enacted in their primary capacity as makers of the fundamental law as when enacted in the form of statutes through the delegated power of their legislatures.*"

4. It is claimed by the plaintiff in error that within the State of Nebraska, or within any other state, for that matter, no process of law is "*due process of law*" that proceeds contrary to valid provisions of the State Constitution.

"*The law of the land necessarily means the law of the state where the offense is committed and where the trial takes place.*"

Garnett vs Jennings, supra.

And here, assuming for the purposes of the argument only, that the people of the State of Nebraska did have authority to adopt Section 10, of Article I, of the Constitution of 1875, as it stands with the proviso touching prosecutions upon information of a public prosecutor, and supposing that the legislature had never provided by law for holding persons to answer for criminal offenses on information of such public prosecutor, then, as we interpret *Hurtado vs California, supra*, a prosecution for a capital or otherwise infamous crime by information of a public prosecutor would not be *due process of law*. In other words, in those states where there is a valid

constitutional provision governing such prosecutions, those provisions constitute in that regard *due process of law,* and the XIV Amendment is a prohibition upon those states from conducting such prosecutions in any other way less favorable to the accused.

5. It is claimed by plaintiff in error that the legislature of the State of Nebraska has never provided by law for holding persons to answer for felonies upon the information of a public prosecutor within the *proviso* of Section 10, Article I, of the Constitution of 1875, nor in no way whatsoever has that immunity ever been taken away from persons within the State of Nebraska.

It is claimed that Chapter LIV, of the Penal Code of the State of Nebraska, under which the state in this case claimed the right to prosecute plaintiff in error upon information, does not directly or indirectly, by implication or construction, give such authority.

The language of the act is perfectly plain and free from the least ambiguity. Every provision of it can be given full effect without granting the claims of the state made here.

In the consideration of this case it is confidently believed that every case has been examined in which the Supreme Court of the United States has had under consideration the binding force and effect of the construction given by a state court to the laws and constitution of that state, and this case is now discussed in the light of those decisions.

Let us assume, therefore, that it is the settled rule of this court to treat the *construction* which a state court has put upon

its statutes as being as much a part of the law of that state as the statutes themselves.

But this court has never assented to the doctrine that state courts may exercise legislative functions under the guise and cloak of statutory interpretation or construction, or that it will be bound by such acts of usurpation.

The federal guarantee to the people of the several states of a republican form of government, which comprehends the distribution of powers among three well recognized branches of the government, would preclude the possibility of such assent.

Let it be supposed that the plaintiff in error had been convicted and sentenced without having been indicted, or even informed against, by a public prosecutor, but solely and alone upon *an order to show cause* why he should not be sentenced to the penitentiary, and upon review in error proceedings the Supreme Court of Nebraska had declared that Chapter LIV, of the Penal Code, *supra*, gave authority for such proceedings, and that the judgment and sentence in the case were legal. Would this court permit itself to be bound by such pretended *construction* and *interpretation*, when brought here for review?

The supposed case is no stronger than the actual one before us.

The language of Section 10, Article I, of the Constitution of 1875, "No person shall be held to answer for a criminal offense," etc., follows the language of the Federal Constitution on the same subject, and the Federal Constitution, says Judge Taney, in the Dred-Scott decision, "Has always been remarkable for the facility of its arrangement of different subjects

and the perspicuity and appropriateness of the language it uses," yet some assistance may be obtained as to the true meaning of the constitutional provision under consideration by amplification of it.

It may be extended in various ways without in the least changing its meaning, and with no other effect than to cause such meaning to stand forth more conspicuously.

For instance, it might be extended thus:

"Though the several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon information for crimes, misdemeanors and offenses, to issue writs and processes and do all other acts therein as they may possess and exercise in cases of like prosecution upon indictments, *yet* no person shall be held to answer for a criminal offense except in cases in which the punishment is by a fine or imprisonment otherwise than in the penitentiary, in case of impeachment and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, unless on a presentment or indictment of a grand jury; provided, that the legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor."

A more extended amplification would be:

"Notwithstanding all the provisions of Chapter LIV, of the Penal Code, *still*, no person shall be held to answer for a criminal offense, etc., * * * * * * unless on a presentment or indictment of a grand jury; provided, that the legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor."

The constitutional provision was intended to secure to the person immunity from a real and virile danger, and to stand as a fence about his person from accusations from every source, except when made by a grand jury.

It had in contemplation that the state might invest its courts with power and jurisdiction to hear, try and determine

prosecutions upon information, yet those courts should be powerless to compel the accused to make an issue until such time as the legislature should by law provide that the immunity should be taken away and the person held to answer.

It contemplated that though the state might invest its proper prosecuting officers with power and authority to file informations in cases of felony, yet no person should be required to plead to such information until the legislature had by law provided for *holding persons to answer* to the information of a public prosecutor.

It contemplated that though each and every one and all of the provisions of Chapter LIV, of the Penal Code, might be enacted by the legislature, and be the law of the state, yet, until the legislature had by law provided for holding persons to answer to the information of a public prosecutor, all the machinery of the state would be powerless to compel the accused to plead to such an information and make an issue to be submitted to a court and jury.

By what process of reasoning can it be held that the enactment of Section 1, of Chapter LIV, takes away the personal immunity of the individual?

At the risk of being wearisome, we venture to illustrate that the point may be made more clear, if possible, because it is the most vital one in the contention that we make.

Successful vaccination secures immunity from smallpox, but the immunity is purely personal to the subjeect. A visitation of the smallpox does not take away that immunity from the vaccinated individual. Both conditions are perfectly con-

sistent and both are correlated in the thought expressed in the word "immunity."

To those who faithfully keep all the commandments of Holy Writ it is promised in the XCI Psalm that such shall have immunity from the pestilence that walketh in the darkness and the destruction that wasteth at noonday and the plague, nor the terror by night, nor the arrow that flieth by day, shall have power to hurt them. But there is no intimation that when the pestilence and the plague was sent that they would *per se* be less virulent or less able to kill and destroy.

And who would venture the argument that because the same benevolent being who had given the immunity afterwards sent the pestilence and plague among men, that that of itself *ipso facto* worked a revocation of the immunity theretofore given.

Happily, Infinite Justice does not mock poor mortals thus, though Nebraska justice may.

The District Courts of Nebraska are under the constitution clothed with common law power, so that under the authority of *Hurtado vs California* they would have power to try felonies upon information of a public prosecutor without the aid of any legislative enactment; but whether they have such common law power, or whether they possess it solely and alone by virtue of Section 1, of Chapter LIV, can make no difference as far as the *immunity* of the individual is concerned, from liability to plead to the information of a public prosecutor.

It will be noted as another remarkable feature of the act that nowhere in it, from beginning to end, is there any author-

ity conferred upon the public prosecutor to file an information in a felony case. If such authority is conferred anywhere by the act, such authority must be found in Sections 2 and 3.

Section 2 says:

"All informations shall be filed during term in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may, by rule or otherwise, prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him."

Section 3 provides:

"All information shall be verified by the oath of the prosecuting attorney, complainant, etc."

Now, in the State of Nebraska, and I presume in most other states, it has always been permissible and legal to prosecute for *misdemeanors* upon information, and, therefore, in giving a meaning to the words "all information," as used in Sections 2 and 3, by what possible rule of interpretation would any court be justified in construing or interpreting those sections as giving *authority* to a county attorney to file an information in a *felony case*, where at the very most the law only purports to give *directions* touching the filing of informations that are within the power of a County Attorney to file, and then by what other rule of interpretation or construction could the meaning of those sections, or of the preceding one, be stretched to a meaning that one so informed against should be required and held to plead to such information in face of the constitutional provision that he should not be held to so anwser until the legislature had by law provided that he must?

In this connection let us instance in what manner the law has spoken in a few of the many cases.

"Every provision affecting any element of a criminal offense involving life or liberty is subject to the strictest interpretation."

Chicago, etc., R. R. Co. vs. People, 67 Ill., 11.

"And this consideration presses with increasing weight according to the severity of the penalty."

United States vs. Moulton, 5 Mason, 537.

"Every provision intended for the benefit of the accused receives the most favorable construction."

United States vs. Ragsdale, Hempst. 497.

"The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment."

American Fur Co. vs. United States, 2 Pet., 367.

"The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a very strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest."

United States vs. Wiltberger, 5 Wheat., p. 76-95.

But these quotations are unnecessary to elucidate principles that are elementary.

Here we are dealing with a right and immunity which has, among all English speaking peoples for five hundred years, been deemed so sacred and necessary to conserve liberty and freedom that it has been carefully preserved in the fundamental

law of every state, so as to be secure and beyond the reach of the fluctuating caprices of erratic legislatures.

And now, granting that the State of Nebraska did have power to provide in its fundamental law that that sacred right and immunity might be taken away by legislative enactment, we are met with the monstrous doctrine, that because the legislature has by law provided that the several courts of the state may have jurisdiction over the subject matter of crimes when prosecuted upon information, that, therefore, they likewise have been invested with jurisdiction over the person, and may strip him of the constitutional immunity solely by virtue of their jurisdiction over the subject matter.

And, likewise, are we met with the no less monstrous doctrine that because the legislature has said "*All information* shall be filed during term time," etc., and "*All information* shall be verified by the prosecuting attorney," etc. That thereby authority is given to a public prosecutor to stand in the place and stead of the grand jury in making accusations in felony cases.

It cannot be supposed that the Supreme Court of Nebraska in its decision in this case had in mind that because the plaintiff in error had been stripped of his property by a fine of more than two hundred thousand dollars, and incarcerated in the penitentiary for a term of nineteen years, upon conviction of a felony made specially infamous as a "high crime," that therefore redress for him through another court, where abides the right of final review, was so remote as to be impossible; nor can it be supposed that the Supreme Court of Nebraska is unfamiliar with the simple and elementary principles of interpre-

tation and construction; nor is it to be supposed that that court would overleap the well defined boundaries of its own department and assume to legislate for the state.

Their decision in this case is, therefore, from a lawyer's standpoint, as unexplainable as the canals and dykes of Mars.

Chapter LIV, of the Criminal Code, herein above quoted, is practically a literal copy of the statutes of Michigan and Wisconsin on the same subject; and in both of those states prosecutions for felonies upon information filed by a public prosecutor have long been in vogue and sustained, from which it is likely to be suggested that the attack here made upon the Nebraska law must be futile. However, a comparison of the Constitutions of Michigan and Wisconsin with that of Nebraska leads to quite the contrary conclusion.

In Michigan there is no constitutional *immunity* from prosecution in any particular way, further than that:

"No person shall be deprived of life, liberty or property without due process of law."

While in Wisconsin the original constitutional provision with respect to prosecutions of offenses upon indictments was amended in 1870 so as to read:

"No person shall be held to answer for a criminal offense without due process of law * * * *."

So that in both of those states the only essential is that criminal prosecutions shall be carried on under such forms as amount to due process of law, and there is in neither of those states any *personal immunity* secured by the constitution which require to be abrogated and taken away before prosecutions

can be had upon informations. Under the holding in *Hurtado vs. California, supra,* requirements of due process of law are fully met by prosecutions upon information as provided for in both Wisconsin and Michigan.

6. Again, we assume that in all of those jurisdictions where the right of a trial by jury in a criminal case is secured by the constitution, that in those jurisdictions due process of law requires that convictions may be legally had in felony cases only at the hands of a jury.

And we assume further that it is within the power of every state, by legislative enactment, to define what shall constitute a trial, to the end and purpose that in those proceedings where parties are to be finally concluded, as to life or liberty, due process of law shall have an exact and certain meaning.

"Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state."

2 Hare Const. Law, 751.
Hurtado vs. California, supra.

The Constitution of the State of Nebraska guarantees to every person tried for a felony *a trial by jury.*

The legislature has enacted that "A *trial* is a judicial examination of the issues, whether of law or of fact, in an action."

Sec. 279 of the Code.

In the case at bar an issue of fact was joined between the parties as to whether or not the plaintiff in error had waived a preliminary examination. This issue involved an examination and determination of a fact just as essential to a legal convic-

tion under the laws of the State of Nebraska as would be proof of the *venue* or the *corpus delicti* itself.

Coffield vs. State, 44 Neb., 417.

The record shows that the plaintiff in error demanded his right in this behalf and was refused.

But let us quote directly from the opinion of the Supreme Court of Nebraska as to the proceedings before the trial court and in what manner the question involved is disposed of by the said Supreme Court. In that opinion the court says:

"The ninth paragraph of the defendant's plea in abatement alleged that he had not had a preliminary examination touching the offenses charged in the information, and that he had not waived the same. To this averment the State replied, admitting that the defendant did not have a preliminary examination, denying each and every other allegation in said paragraph of the plea, and averring that the accused waived his right to a preliminary examination. The defendant demanded a trial by jury upon the issue tendered by the ninth paragraph of the plea in abatement, which was overruled, and the trial court found that the defendant had waived a preliminary examination before the examining magistrate, and accordingly overruled said paragraph of the plea in abatement. The denial of a trial by jury to determine whether the right to a preliminary examination had been waived by the prisoner is assigned for error. Conceding for the purpose of this case that the accused was entitled to have this question passed upon by a jury, yet the refusal of this request did not work a reversal of the judgment of conviction. Doubtless he could have waived the calling of a jury to pass upon that proposition, had he so desired, since the statute does not specify how it shall be determined. It follows that the denial of a jury trial upon the issue in question was unimportant, as the defendant was in no manner prejudiced thereby. Suppose the uncontradicted testimony before the trial court had shown that a preliminary examination upon the crimes charged in the information has been waived by the defendant, he would not have been injuriously affected by the refusal of a jury to pass upon that portion of his plea, for had one been called the verdict must necessarily have been the same as the finding of the court. Error cannot be presumed, but must appear affirmatively to justify a reversal of a cause."

Here we have announced the doctrine that in a trial of a defendant for a high crime, though he may be entitled to have a jury pass upon an issue of fact as here admitted, yet the refusal of a jury trial in such case is not reversible error unless the accused can show affirmatively that he was prejudiced by the refusal; and this is said in face of the constitutional provisions of the state that guarantees the accused a trial by jury, and where a trial is defined as being an examination of an issue of fact. If that is due process of law within the State of Nebraska, then life, liberty and property is at least as safe under the laws and customs of the Sioux Indians.

The opinion of the court in *Hurtado vs California* was vigorously dissented from by Mr. Justice Harlan. Of the judges who concurred in that opinion, Mr. Justice Gray alone remains upon this bench.

It seems as if the doctrine there contended for by the State of California was carried to the very limit to which this court was then willing to go. It is with the conviction that it was there carried to the utmost limit that it ought to be carried that we have brought this case here.

To affirm the conviction of the plaintiff in error upon the record presented will be sweeping away the most stable barrier that protects life, liberty and property in the several states.

Respectfully submitted,

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